

1, 1996 to November 2, 1996. The 2001 pole count was conducted from approximately February 5, 2001 to April 27, 2001.

Both pole counts were conducted with the same methodologies and collected the same information. Gulf Power, with the appropriate telephone company, conducted a total joint use pole count over Gulf Power's entire service territory. The pole counts were done with teams of one Gulf Power representative accompanied by one telephone company representative, either BellSouth or Sprint (The one exception to this system was in the 2001 count where BellSouth contracted Gulf Power to count the BellSouth areas). Teams would count by Gulf Power grid maps in each of the telephone company's respective service areas that overlap Gulf Power's service area. Each team is tasked with the (a) location and ownership of all joint use poles on the map, (b) assigning a sequential number to each pole for identification and counting, (c) and lastly, to identify each CATV or telecom attacher, if any, that is on each joint use pole identified on the grid maps. This process was followed until all the grid maps were counted.

Reports would then be produced that would show (1) the number of Gulf Power attachments on telephone poles, (2) the number of telephone attachments on Gulf Power poles and, (3) the number and company name of all CATV and telecommunication attachments made to both Gulf Power poles and each telephone company.

Below is a list of names of persons that worked for Gulf Power on each of the two pole counts: [chart listing 7 names for 1996 pole count and chart listing 24 names for 2001 pole count].

Complainants' Argument:

Gulf Power's response is incomplete. Once again, Gulf Power has not identified the telephone numbers, addresses, or titles/positions of the persons that it has listed. Complainants, by defining the term "identify" to include this information, are entitled to receive this very basic information in order to help determine whom to take depositions of as discovery proceeds in this case.

In addition, Gulf Power has only listed names of persons that worked for Gulf Power. The interrogatory asks for the names, titles, and employers of *all* persons involved in pole surveys, audits, or counts. Gulf Power admits that it worked with at least two other companies, BellSouth and Sprint, in performing these counts. It is likely to have information about who at

those companies it worked with on the 1996 and 2001 pole counts. It should be required to produce that information, since it was requested, and Complainants have the right to pursue discovery against those third parties regarding attachments on Gulf Power poles.

Interrogatory No. 18:

Identify the total number of poles owned or controlled by Gulf Power that utilize cross-arms, extension arms, or boxing arrangements and describe those arrangements, the parties whose attachments use such arrangements, and the reasons for utilizing them.

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

Complainants' Argument:

Gulf Power's objections of overbreadth and relevance are not well taken. Gulf Power's ability to establish a constitutional claim for greater compensation depends upon its ability to meet the *Alabama Power* requirement of showing that specific poles are at "full capacity" and cannot accommodate additional attachments. However, Gulf Power, like many electric utilities, uses numerous measures in the normal course of its business to provide sufficient capacity and accommodate additional attachments on poles. Those measures may include the use of "cross-arms, extension arms, or boxing arrangements [attachments on both sides of a utility pole]." Complainants have therefore asked, in this interrogatory, whether Gulf Power uses such arrangements to provide capacity for its own or third-party attachments, and, if so, on how many Gulf Power poles they are used, who uses them, and for what purposes. The reason why this interrogatory is relevant is that, if Gulf Power uses these measures to provide capacity for itself or others, and such measures can be used on poles that include Complainants' attachments to accommodate new attaching entities, then Gulf Power cannot in fact claim a constitutional

entitlement to a higher pole rate based upon the “missed opportunity” that the Eleventh Circuit made clear was a *sine qua non* of any such claim. Furthermore, Gulf Power has not provided any reason or explanation to support its claim of overbreadth. In fact, the interrogatory is not overbroad, since it asks only for a total number of poles on which Gulf Power uses the specified measures (something that Gulf Power should be capable of counting, or at least estimating); Gulf Power’s own description of its use of cross-arms, extension arms, and boxing arrangements; a listing of the parties whose attachments on Gulf Power poles make use of such measures (i.e., does Gulf Power use them, does BellSouth, does Sprint, do telecommunications attachers?); and the reasons why Gulf Power utilizes such measures.

Interrogatory No. 19:

Of the total number of poles owned or controlled by Gulf Power that utilize cross-arms, extension arms, or boxing arrangements, identify and describe those individual poles to which Complainants are attached that use such arrangements and the reasons for utilizing these arrangements.

Gulf Power’s Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

Complainants’ Argument:

Gulf Power’s objections of overbreadth and relevance are not well-taken, for the same reasons discussed above in reference to Interrogatory No. 18. Once again, if Gulf Power uses one or more of the specified measures – cross-arms, extension arms, or boxing arrangements – to provide capacity on poles to which Complainants are attached, such evidence is relevant to and bears directly upon any claims that Gulf Power might make that such poles, or other poles containing Complainants’ attachments that do not use such measures, are at “full capacity” within the *Alabama Power* standard. Moreover, it is not overbroad for Complainants’ to demand

a response to questions about the measures used to provide capacity on Gulf Power poles to which Complainants are attached.

Interrogatory No. 20:

Identify and describe, for each cable operator Complainant, the number of Gulf Power poles that have been changed out from 1998 to the present in order to accommodate attachments of Complainants, the location of any such change-outs, the reasons for each change-out, and identify any and each instance in which Gulf Power was not reimbursed by Complainants for the costs of such change-outs.

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues. To the extent the information sought is discoverable, it is the subject of other interrogatory response and Gulf Power's responses to complainants' request for production.

Complainants' Argument:

Gulf Power's objections of overbreadth and relevance are not well-taken. In its January 8, 2004 Description of Evidence, Gulf Power contended that it has made "pole change-outs due to full capacity" and that "[s]uch change-outs evidence 'crowding' and 'full capacity' (part (1) of the test), as well as 'another buyer waiting in the wings' (part (2)(b) of the test)." See Description of Evidence, 3-4. Thus, Gulf Power itself, in asking for the hearing in this case, has alleged that pole change-outs are relevant to its ability to meet the requirements of *Alabama Power*. In this interrogatory, Complainants have sought to discover the evidence concerning pole change-outs that Gulf Power claims it has.

Moreover, this interrogatory is not overly broad, since it focuses on change-outs to poles involving attachments of Complainants. The interrogatory reasonably asks for information about the location for a change-out, the reason underlying it, and, most importantly, whether Gulf

Power was not reimbursed by a third party for the costs of the change-out and thereby was “out . . . more money” as required by *Alabama Power*. 311 F.3d at 1369-70.

Finally, Gulf Power may not simply claim that it has provided a sufficient answer by referring to its responses to “other interrogator[ies]” or its responses to Complainants’ document requests, because Gulf Power has not provided any indication of the “extent the information sought is discoverable” (using its own words) and has not identified any other such interrogatories or specified any document or set of documents that it claims is responsive to this Interrogatory. Also, to the extent the relevant documents are included within the collection of documents produced for review in May, none were specifically identified as being responsive to this interrogatory.

Interrogatory No. 21:

Identify and describe the number of Gulf Power poles that have been changed-out on account of a communications attacher’s request (other than Complainants) and the circumstances surrounding such replacement or substitution (*i.e.*, specify the reason for the change-out and the party whose action or request necessitated it).

Gulf Power’s Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues. To the extent the information sought is discoverable, it is the subject of other interrogatory response and Gulf Power’s responses to complainants’ request for production.

Complainants’ Argument:

Gulf Power’s objections of overbreadth and relevance are not well-taken. As set forth above as to Interrogatory No. 20, Gulf Power has contended that it has made “pole change-outs due to full capacity” and that “[s]uch change-outs evidence ‘crowding’ and ‘full capacity’ (part (1) of the test), as well as ‘another buyer waiting in the wings’ (part (2)(b) of the test).” See Description of Evidence, 3-4. Thus, Gulf Power itself, in asking for the hearing in this case, has

alleged that pole change-outs are relevant to its ability to meet the requirements of *Alabama Power*. In this interrogatory, Complainants have sought to discover the evidence concerning pole change-outs that Gulf Power claims it has.

Moreover, this interrogatory is not overly broad, since it focuses on change-outs to poles involving attachments of communications company attaching entities. The interrogatory reasonably asks for information about the reason underlying the change-out, and the party whose action or request necessitated it. In its Description of Evidence, Gulf Power claimed that it had evidence about change-outs performed for various telecommunications companies (i.e., Knology, KMC Telecom II, Inc., Adelphia Business Solutions, Southern Light, LLC). See Description of Evidence, 3-4.

Finally, Gulf Power may not simply claim that it has provided a sufficient answer by referring to its responses to “other interrogator[ies]” or its responses to Complainants’ document requests, because Gulf Power has not provided any indication of the “extent the information sought is discoverable” (using its own words) and has not identified any other such interrogatories or specified any document or set of documents that it claims is responsive to this Interrogatory. More to the point, to the extent the relevant documents are included within the collection of documents produced for review in May, none were specifically identified as being responsive to this interrogatory either.

Interrogatory No. 22:

Identify and describe the number of Gulf Power poles that have been changed-out on account of a non-communications attacher’s request and the circumstances surrounding such change-out (*i.e.*, specify the reason for the change-out and the party whose action or request necessitated it).

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues. To the extent the information sought is discoverable, it is the subject of other interrogatory response and Gulf Power's responses to complainants' request for production.

Complainants' Argument:

Gulf Power's objections of overbreadth and relevance are not well-taken. As set forth above as to Interrogatory No. 20, Gulf Power has contended that it has made "pole change-outs due to full capacity" and that "[s]uch change-outs evidence 'crowding' and 'full capacity' (part (1) of the test), as well as 'another buyer waiting in the wings' (part (2)(b) of the test)." See Description of Evidence, 3-4. Thus, Gulf Power itself, in asking for the hearing in this case, has alleged that pole change-outs are relevant to its ability to meet the requirements of *Alabama Power*. In this interrogatory, Complainants have sought to discover the evidence concerning pole change-outs that Gulf Power claims it has.

Moreover, this interrogatory is not overly broad, since it focuses on change-outs to poles involving attachments by parties other than communications companies. In other words, this interrogatory seeks to discover the circumstances under which Gulf Power has agreed to change out poles to provide capacity either for itself, for its electric company affiliates, for government entities, or other parties. To the extent that Gulf Power is contending that it has made unreimbursed change-outs for such parties on poles containing Complainants' attachments and is seeking to use such circumstances to claim a higher annual pole rate, Complainants are entitled to discover such evidence. The interrogatory reasonably asks for information about the reason underlying the change-out, and the party whose action or request necessitated it.

Finally, Gulf Power may not simply claim that it has provided a sufficient answer by referring to its responses to “other interrogator[ies]” or its responses to Complainants’ document requests, because Gulf Power has not provided any indication of the “extent the information sought is discoverable” (using its own words) and has not identified any other such interrogatories or specified any document or set of documents that it claims is responsive to this Interrogatory.

Interrogatory No. 23:

Identify and describe the number of Gulf Power poles that have been changed-out on account of Gulf Power’s core electricity service requirements and the circumstances surrounding such change-out (*i.e.*, specify the reason for the change-out and the party who paid for the costs associated with the change-out).

Gulf Power’s Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues. To the extent the information sought is discoverable, it is the subject of other interrogatory response and Gulf Power’s responses to complainants’ request for production.

Complainants’ Argument:

Gulf Power’s objections of overbreadth and relevance are not well-taken. As set forth above as to Interrogatory No. 20, Gulf Power has contended that it has made “pole change-outs due to full capacity” and that “[s]uch change-outs evidence ‘crowding’ and ‘full capacity’ (part (1) of the test), as well as ‘another buyer waiting in the wings’ (part (2)(b) of the test).” See Description of Evidence, 3-4. Thus, Gulf Power itself, in asking for the hearing in this case, has alleged that pole change-outs are relevant to its ability to meet the requirements of *Alabama Power*. In this interrogatory, Complainants have sought to discover the evidence concerning pole change-outs that Gulf Power claims it has.

Moreover, this interrogatory is not overly broad, since it focuses on change-outs to poles involving attachments by Gulf Power itself for its core electricity service requirement. In its Description of Evidence, Gulf Power suggested that it had evidence regarding instances where it had to install its own equipment (i.e., a transformer) to accommodate its own electricity needs but could not without having to change-out a pole containing Complainants' attachments at its own expense. See Description of Evidence, 6 and n.13 ("Gulf Power intends to present evidence of the number of occasions in the past few years in which it was required to change-out a pole, for its own core business purposes, due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments). To the extent that Gulf Power is contending that it has made un-reimbursed change-outs on poles containing Complainants' attachments and is seeking to use such circumstances to claim a higher annual pole rate, Complainants are entitled to discover such evidence which supposedly existed at the time Gulf power filed its Description. The interrogatory reasonably asks for information about the reason underlying the change-out, and who paid the costs associated with the change-out.

Finally, Gulf Power may not simply claim that it has provided a sufficient answer by referring to its responses to "other interrogator[ies]" or its responses to Complainants' document requests, because Gulf Power has not provided any indication of the "extent the information sought is discoverable" (using its own words) and has not identified any other such interrogatories or specified any document or set of documents that it claims is responsive to this Interrogatory. None of the documents produced for review in May were referenced specifically or even generally as responsive to this interrogatory.

Interrogatory No. 24:

Identify and describe the occasions on which Gulf Power has refused to change-out a pole. Your response should include, but not be limited to, a description of

the circumstances surrounding the refusal, the identification of the entity requesting the pole replacement, and an explanation of the reasons for Gulf Power's refusal and any alternate arrangement employed.

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

Complainants' Argument:

Gulf Power's objections on the grounds of overbreadth and relevance are not well-taken. Part of Gulf Power's burden in this proceeding is to identify specific poles that, under the first prong of the Alabama Power test, are at "full capacity." In its Description of Evidence, Gulf Power suggested that pole change-outs are related to a lack of capacity. Description of Evidence, 3-4. Complainants' position, however, is that Gulf Power can demonstrate that a particular pole is at "full capacity" only when it cannot be changed out in the normal course of Gulf Power's business practices for reasons relating to safety, engineering, etc. Accordingly, the question of when, and for what reasons, Gulf Power has refused to change-out a pole is relevant to the issue of whether and when a pole is at "full capacity." This interrogatory is not overly broad, since it asks only, for the period since January 1998, for information about when Gulf Power has refused to change out a pole (most likely a limited number of instances); the circumstances surrounding the refusal, the identify of the entity seeking the change-out, and the reasons for the refusal and any alternate arrangements. This information goes to the heart of Gulf Power's contention that "change-outs evidence 'crowding' and 'full capacity'" and Complainants' opposing contention that, instead, under Alabama Power's standard of a "missed opportunity," it is the inability to accommodate an additional attachment through a change-out, or through extension arms or other measures, that would constitute a showing of "full capacity."

Interrogatory No. 25:

Describe and explain the steps and procedures involved in changing-out a pole, from a prospective attacher's request (or Gulf Power's own core electricity need) to completion (i.e., including processing, procurement, placement and transfer or existing facilities and equipment, including estimated time periods).

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

Complainants' Argument:

Gulf Power's objections on the grounds of overbreadth and relevance are not well-taken. As set forth above as to Interrogatory No. 20, Gulf Power has contended that it has made "pole change-outs due to full capacity" and that "[s]uch change-outs evidence 'crowding' and 'full capacity' (part (1) of the test), as well as 'another buyer waiting in the wings' (part (2)(b) of the test)." See Description of Evidence, 3-4. Thus, Gulf Power itself, in asking for the hearing in this case, has alleged that pole change-outs are relevant to its ability to meet the requirements of *Alabama Power*.

By contending that it has had to make change-outs without being reimbursed, see Description of Evidence, 6 and n.13, Gulf Power has also made relevant the subject of what steps constitute a change-out and what those steps cost Gulf Power, if anything at all, after the attacher has made payment. Therefore, this interrogatory reasonably seeks evidence about the steps and procedures Gulf Power follows in changing out its poles, including processing, procurement, placement and transfer or existing facilities and equipment, including estimated time periods. Similarly, this interrogatory is not overly broad, since it asks only for a general description of the procedures involved in changing-out a pole.

Interrogatory No. 26:

Identify all persons involved in developing Gulf Power's pole make-ready and change-out procedures, their titles and responsibilities, and a description of their roles in formulating the procedures, and identify the specific persons, whether or not employed by Gulf Power, that You rely upon to determine whether make-ready or a change-out is needed, or whether a Gulf Power pole is at "full capacity," "crowded," or has a "lack of capacity."

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it [is] overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

Complainants' Argument:

Gulf Power's objections on the grounds of overbreadth and relevance are not well-taken. As set forth above as to Interrogatory No. 20, Gulf Power has contended that it has made "pole change-outs due to full capacity" and that "[s]uch change-outs evidence 'crowding' and 'full capacity' (part (1) of the test), as well as 'another buyer waiting in the wings' (part (2)(b) of the test)." See Description of Evidence, 3-4. Thus, Gulf Power itself, in asking for the hearing in this case, has alleged that pole change-outs are relevant to its ability to meet the requirements of *Alabama Power*. In this interrogatory, Complainants reasonably ask for Gulf Power to identify the persons involved in developing its pole change-out and make-ready procedures, their titles and responsibilities, and their roles in formulating the procedures. Complainants also ask for the identification of any persons Gulf Power relies upon to determine whether a pole is at "full capacity." These questions go to the heart of the *Alabama Power* requirements of demonstrating full capacity and other valued uses. To the extent that Gulf Power is alleging, as it did in its Description of Evidence, that pole change-outs and other make-ready are evidence of full capacity, Complainants are entitled to discovery who is making such decisions for Gulf Power, what the criteria used by those persons is, and how such persons have applied Gulf Power's criteria as to specific poles containing Complainants' attachments for which Gulf Power is

seeking greater compensation. Moreover, without such information about Gulf Power's personnel who make these decisions, Complainants cannot proceed to take their depositions and pursue further discovery.

Interrogatory No. 28:

Does Gulf Power share, pool, or otherwise utilize an inventory of poles owned or controlled by affiliated corporations, parents, subsidiaries, and other organizations or operating units, and, if so, indicate and explain in detail the manner in which Gulf Power shares, pools, or otherwise utilizes such inventory.

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it is vague and ambiguous. Subject to and without waiving this objection, Gulf Power shares some in-service poles with BellSouth, GTC and Sprint pursuant to joint use agreements.

Complainants' Argument:

Gulf Power's partial objection on grounds of vagueness is not well-taken, and its response is incomplete. Gulf Power has not provided any reason to support its claim that the question is "vague" or "ambiguous." This interrogatory clearly seeks to discover whether Gulf Power uses poles owned or controlled by affiliated companies or third parties, and, if so, under what circumstances. The interrogatory relates directly to the pole resources Gulf Power has at its disposal, which affects the issue of whether there is "full capacity" at any particular pole location. If Gulf Power has additional poles available to it, beyond those in its own pole inventory, Complainants are entitled to a description of the procedures followed by Gulf Power in obtaining such poles. To the extent that Gulf Power is claiming that poles it shares with others are at "full capacity" and have a "higher valued use," moreover, Complainants are entitled to a specification of how many such poles, at what locations, Gulf Power in fact uses and what ownership interests Gulf Power and others have in such poles.

Interrogatory No. 29:

Gulf Power represents that it will seek to present evidence of instances in which it has changed-out poles "due to lack of capacity." Describe and explain the circumstances in which a Gulf Power pole, according to You, had and/or has a "lack of capacity" and state where (by pole number and location) and when, if at all, any such determination of "lack of capacity" was made with respect to Gulf Power poles containing any of Complainants' attachments.

Gulf Power's Response:

A pole has a "lack of capacity" when another attachment cannot be made. (See response to interrogatory number 2 above). The determination of which poles lack capacity is made by field employees while riding the line to determine the feasibility of an attachment request. Such decisions are made almost everyday in the field and there is no way of identifying each instance where this has occurred. Complainants had attachments on poles changed-out in the build-outs referenced in Gulf Power's January 8, 2004 Description of Evidence.

Complainants' Argument:

Gulf Power's response is evasive and incomplete. Its statement that lack of capacity exists "when another attachment cannot be made" is circular; it provides no information whatsoever. The question requires Gulf Power to identify the factual circumstances, whether caused by engineering, regulatory, safety, or other issues, under which it contends that no such additional attachments can be made to its poles because of a claimed lack of capacity. Gulf Power has not done so.

But more importantly, Gulf Power's answer suggests, without actually admitting, that it cannot produce evidence of when, for particular poles, it has determined that they are at "full capacity." Gulf Power's answer states that "there is no way of identifying each instance" where an individual pole has lacked capacity. This response is particularly striking and bears careful evaluation. Gulf Power references "build-outs" described in its January 8, 2004 Description of Evidence, but its answer does not mention a single specific pole, let alone identify pole numbers and locations, that it contends has, at some time, had a lack of capacity. Accordingly, Gulf

Power must either identify each specific pole that it has previously identified, either in formulating its Description of Evidence or for other purposes, as having had a “lack of capacity” or fully admit, as it seems to say, that it has no such evidence.

Interrogatory No. 30:

Identify and explain every instance in which Gulf Power has changed-out a pole containing one or more of Complainants’ attachments at Gulf Power’s own expense (*i.e.*, un-reimbursed) as a result of a need to accommodate an electric transformer or other Gulf Power equipment or facility.

Gulf Power’s Response:

It is not possible to identify each such instance, but Gulf Power changes-out poles at its own expense almost everyday in the field. If Gulf Power sees a pole that needs to be changed-out to serve a customer, Gulf Power changes-out the pole and serves its customer as fast as possible.

Complainants’ Argument:

Gulf Power’s response is evasive and incomplete. In its Description of Evidence, Gulf Power stated explicitly that it “intends to present evidence of the number of occasions in the past few years in which it was required to change-out a pole, for its own core business purposes, due to capacity.” Description of Evidence, 6 n.13. It listed the accommodation of an electric transformer as an example. But now, Gulf Power completely fails to answer a question about this very assertion. Gulf Power says it cannot identify “each” instance in which it has performed a change-out at its own expense where other parties’ (let alone Complainants’) attachments were on the same pole, but, more notably, it fails to identify a *single* such instance or any individual pole! Clearly, Gulf Power has a duty to put forth the evidence it claimed it had when it filed its Description of Evidence and asked for this adjudicatory proceeding, or it should admit that it has no such evidence.

Interrogatory No. 31:

From the “Recommendations” proposed in Gulf Power’s Distribution Studies and load planning documents furnished to Complainants on January 11, 2005, identify and describe those “Recommendations” that Gulf Power actually implemented, the specific numbers and locations of poles affected, whether additional pole capacity on those was actually utilized by Gulf Power, measurements indicating how much space was required, and if any Recommendation was not implemented, the reasons therefore.

Gulf Power’s Response:

Gulf Power objects to this interrogatory on the grounds that it is vague, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information irrelevant to the hearing issues.

Complainants’ Argument:

Gulf Power’s objections on vagueness, undue burden, and relevance are not well-taken. In its Description of Evidence, Gulf Power stated that one of the reasons why it sought a hearing was to introduce “evidence concerning Gulf Power’s load studies and business plan.” It suggested that its load studies and business plans were relevant to its “‘reserving’ pole space for future use” and even contended that such evidence “relates to the ‘higher-valued use’ element” in the *Alabama Power* test. *See* Description of Evidence, 5-6. Accordingly, Gulf Power has claimed that such evidence is relevant to this proceeding. Complainants’ interrogatory, which asks Gulf Power identify specific instances where it actually implemented its load studies or planning documents to reserve space for its own, is therefore both relevant and reasonable in its scope. It is not vague either, as it seeks to identify specific instances of where Gulf Power has actually implemented its plans or recommendations to reserve pole space. Once again, Gulf Power has the duty to identify specific instances or admit that it has no such evidence.

Interrogatory No. 34:

Does Gulf Power routinely inform prospective and existing attachers when it reserves pole space for future use for its core electricity operations, and if so,

identify and describe all such reservations and notifications to attachers, including Complainants, since 1998.

Gulf Power's Response:

Yes. Prospective attachers are shown and/or given a copy of Gulf Power's 'spec plate' prior to attaching.

Complainants' Argument:

Gulf Power's response is evasive and incomplete. In its Description of Evidence, Gulf Power suggested that it has evidence of when it has reserved space for its own "higher-valued use" under the Alabama Power test. The interrogatory asks for the identification of all instances. But Gulf Power fails to describe a single such reservation or notice to an attacher of such a reservation. Gulf Power has a duty to identify all such instances or admit that it has no such evidence.

Interrogatory No. 35:

Does Gulf Power contend that it requires the use of reserved pole space currently occupied by Complainants, and if so, identify all such pole space, the specific poles at issue by number and location, and describe Gulf Power's and the electric industry's practice concerning whether attachers, including Complainants, are given the opportunity to pay for the cost of any modifications needed to rearrange or change-out the poles and to continue to maintain their attachments.

Gulf Power's Response:

None. Gulf failed to provide any answer to Interrogatory No. 35.

Complainants' Argument:

Gulf has a duty to respond to this interrogatory.

Interrogatory No. 36:

Does Gulf Power contend that it may charge Complainants that are already attached to its poles the rearrangement or change-out costs of modifications required as a result of an additional attachment or the modification of an existing attachment sought by any other attacher, including Gulf Power? Explain the basis for your answer.

Gulf Power's Response:

Gulf Power Company's contention and position on charges to complainants for "rearrangement or change-out costs of modifications" is the same as, based upon, and as required by 47 U.S.C. § 224(h)-(i), which provides as follows: [quoting statutory language].

Complainants' Argument:

Gulf Power's response is evasive and incomplete. Gulf Power has failed to answer the question posed by this interrogatory. Instead, it merely says, in effect, that it intends to charge Complainants in accordance with applicable law, and then quotes various statutes. This is a non-answer. Moreover, the statutory sections Gulf Power cites, 47 U.S.C. § 224(h) and (i), do not refer to pole change-outs.

Moreover, in its Description of Evidence, Gulf Power suggested that pole change-outs for third parties were both evidence of "full capacity" and evidence of a "higher-valued use," Description of Evidence, 3-4, implying that such instances were provided a sufficient constitutional basis under *Alabama Power* for Gulf Power to charge Complainants' higher pole attachment rates. Gulf Power's Description of Evidence, however, did not describe the conditions under which it claimed that change-outs could be relevant to meeting the *Alabama Power* requirements (i.e., are the costs of the change-outs reimbursed to Gulf Power by a third party?) This interrogatory reasonably seeks to discover the facts and circumstances under which Gulf Power believes it can charge Complainants for change-outs requested by parties other than Complainants. Gulf Power must answer the question.

Interrogatory No. 37:

Does Gulf Power contend that payment of make-ready expenses by an attacher is insufficient to reimburse Gulf Power for its marginal costs, and if so, explain the basis of any such contention.

Gulf Power's Response:

Yes. See response to interrogatory number 7 above. The *APCo v. FCC* decision uses the term "marginal costs" interchangeably with the Cable Rate.

Complainants' Argument:

Gulf Power's response is evasive, incomplete, and inconsistent, as a matter of law, with *Alabama Power*. First, contrary to Gulf Power's claim that "marginal costs" "equal" the annual compensation under the FCC's Cable Formula, the Eleventh Circuit stated repeatedly in *Alabama Power* that "*much more than* marginal cost is paid under the [FCC's] Cable Rate." 311 F.3d at 1369, 1370 (emphasis added). Thus, Gulf Power cannot, under applicable precedent, make the claim that its "marginal costs" are equivalent to what it already receives through the combination of make-ready and annual pole rents under the FCC Cable Rate.

Under *Alabama Power*, the "marginal costs" of Complainants' attachments to Gulf Power's poles means the additional, incremental, actual costs caused by Complainants' attachments. The Eleventh Circuit even explained that marginal costs were made up merely of "make-ready" costs and costs that could be tied directly to the make-ready process of attaching, "such as maintenance costs and the opportunity cost of capital devoted to make-ready." 311 F.3d at 1368-69.

Accordingly, if Gulf Power contends that make-ready costs are insufficient to reimburse all of Gulf Power's "marginal costs" of Complainants' attachments, Gulf Power has the burden to identify specifically any other cost, within the narrow parameters set by *Alabama Power*, that is an incremental, additional cost that Gulf Power actually incurs due to Complainants' attachments; quantify any such cost; and provide any evidentiary support showing that such costs were actually incurred by Gulf Power.

Interrogatory No. 38:

Identify and describe all facts, documents, data and other information that support Gulf Power's claim for a pole attachment rental rate from any cable operator Complainant in excess of marginal cost.

Gulf Power's Response:

Gulf Power objects to this interrogatory on the grounds that it is overly broad and unduly burdensome insofar as it seeks a reiteration of all legal principles, facts and documents addressed since the outset of this proceeding and the proceeding leading to the APCo v. FCC opinion.

Complainants' Argument:

Gulf Power's objections of overbreadth and undue burden are vastly exaggerated and do not provide a basis for Gulf Power's refusal to provide any answer at all to this Interrogatory. Contrary to Gulf Power's objection, this interrogatory does not ask for a recitation of "legal principles." Nor does it call for a "reiteration" of all facts "since the outset of this proceeding" or the proceeding involved *Alabama Power*, which involved Gulf Power's affiliate but did not involve Gulf Power directly.

Instead, this interrogatory, reasonably construed, calls for Gulf Power to identify the central facts, as well as documents, that support Gulf Power's Fifth Amendment-based claim for pole compensation in excess of the marginal costs that Complainants already reimburse to Gulf Power to have their attachments placed on Gulf Power's poles. For example, Gulf Power has claimed a "annual just compensation rate" of \$40.60 (see its response to Interrogatory No. 10) but has refused to explain how it arrived at that figure. This interrogatory properly requires that Gulf Power identify the facts and produce the data that underlie its claim, under the *Constitution*, to this pole attachment rental rate.

Interrogatory No. 39:

Identify and explain the methodologies, formulae, cost accounts, data and/or other bases, if any, used by Gulf Power in calculating or formulating the pole attachment rental rate in excess of marginal cost and identify all persons, whether or not employed by Gulf Power, involved in any way in the determination of such methodologies, formulae, cost accounts, data and/or other bases.

Gulf Power's Response:

Gulf Power will disclose this information in accordance with the Presiding Judge's March 30, 2005 Order.

Complainants' Argument:

Gulf Power's answer is evasive and incomplete. Gulf Power has refused to answer the question, alleging that it will answer it in accordance with the March 30, 2005 Order. But that Order does not provide a deadline for identifying factual data, cost accounts, formulae, or methodologies that Gulf Power claims underlie its constitutional claim of entitlement to a "just compensation" pole rate of, apparently, \$40.60. The March 30, 2005 Order sets a November 18, 2005 deadline for exchanging summaries of testifying experts and their *opinions*, but it in no way justifies Gulf Power to wait until nearly the end of the year until it produces its factual data. Once again, Gulf Power seems to hope that it can delay producing facts to support its claims until practically the close of discovery, thereby trying to preclude Complainants from taking depositions and serving additional written discovery requests to explore the bases of Gulf power's claims.

The Presiding Judge has already made clear that this sort of evasive response is improper. In Gulf Power's January 8, 2004 Description of Evidence, for example, it proffered the rate of \$40.60 as evidence of the rate it is seeking to charge Complainants. This interrogatory seeks to discover the evidence, if any, supporting this rate and any underlying assumptions. In his Order of April 15, 2005, the Presiding Judge made clear that the fact that Gulf Power may continue to

produce additional evidence “does not excuse Gulf Power from providing complete interrogatory answers with respect to the proof it had on January 8, 2004, that relate to its Description of Evidence.” The Judge further noted: “Gulf Power made its Description of evidence proffer and therefore Gulf Power is expected to have authentic and reliable proof to back up its proffer. The interrogatories appear designed to flush out the proof.”

The Presiding Judge was correct. The interrogatories, such as this one, are designed to “flush out” any evidence Gulf Power has, but they will only do so if Gulf Power is required to answer. It may not stonewall and seek to delay until the close of discovery.

Interrogatory No. 40:

Identify all documents that reflect or refer to negotiations between communications attachers (including Complainants) and Gulf Power involving pole attachment rental rates exceeding the FCC’s Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e), and implementing regulations.

Gulf Power’s Response:

See documents within Bates range Gulf Power 00826-2309.

Complainants’ Argument:

Gulf Power’s listing of documents is insufficiently specific and lacks a representation as to whether the listed documents contain all the documents in Gulf Power’s possession, custody, or control that are responsive to the Interrogatory. For example, Gulf Power’s answer to this question about negotiations with “communications attachers (including Complainants)” references nearly 1,483 pages of documents, but the identical 1,483 pages are referenced in response to Interrogatory No. 42, which asks a different question about Gulf Power’s negotiations with “non-Section [47 U.S.C.] 224, non-joint user attachers.” In addition, while this interrogatory specifically asks for documents that reflect negotiations with Complainants, the 1,483 pages referenced contain almost no documents pertaining to the Complainants in this

adjudication. Accordingly, Complainants are entitled to a more careful and more specific response from Gulf Power, and a response that includes documents pertaining to Complainants.

Interrogatory No. 41:

Identify all documents that reflect or refer to negotiations between joint users of a pole (*i.e.*, an incumbent local exchange carrier) and Gulf Power involving pole attachment rental rates exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e), and implementing regulations.

Gulf Power's Response:

See documents Bates labeled as Gulf Power 2089-2148.

Complainants' Argument:

Gulf Power's listing of documents lacks a representation as to whether the listed documents contain all the documents in Gulf Power's possession, custody, or control that are responsive to the Interrogatory. The 59 pages of documents referenced contain only three signed versions of Joint Use Agreements between Gulf Power and BellSouth, Sprint, and GTC, Inc. The pages do not include any drafts, correspondence, memoranda, e-mail, notes, or other documents that might actually "reflect or refer to *negotiations*" between Gulf Power and its joint pole use partners. It is reasonable to believe that some such documents exist. Accordingly, Gulf Power, since it has partial control of joint use poles with such joint users, and such users may therefore have a role in determining and affecting any decisions about such poles' "capacity" for attachments, has a duty to produce documents reflecting the underlying negotiations leading to the referenced joint use agreements.

Interrogatory No. 42:

Identify all documents that reflect or refer to negotiations between non-Section 224, non-joint user attachers (*e.g.*, R. L. Singletary, Inc. and Crest Corporation) and Gulf Power involving pole attachment rental rates exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e), and implementing regulations.

Gulf Power's Response:

See documents within Bates range Gulf Power 00826-2309.

Complainants' Argument:

Gulf Power's listing of documents is insufficiently specific and lacks a representation as to whether the listed documents contain all the documents in Gulf Power's possession, custody, or control that are responsive to the Interrogatory. For example, Gulf Power's answer to this question about negotiations with "non-Section [47 U.S.C.] 224, non-joint user attachers" references nearly 1,483 pages of documents, but the identical 1,483 pages are referenced in response to Interrogatory No. 40, which asks a different question about Gulf Power's negotiations with "communications attachers (including Complainants)." Accordingly, Complainants are entitled to a more careful and more specific response from Gulf Power.

Interrogatory No. 44:

Describe and explain Gulf Power's understanding of the Sales Comparison Approach as highlighted in Gulf Power's December 3, 2004 "Preliminary Statement on Alternative Cost Methodology," and explain Gulf Power's application of this approach to calculating pole attachment rental rates.

Gulf Power's Response:

The Sales Comparison Approach looks to other sales of identical property (free of government regulation). Gulf Power will explain its application of the Sales Comparison Approach when it discloses its experts in accordance with the Presiding Judge's December 17, 2004 Order.

Complainants' Argument:

Gulf Power's response is evasive and incomplete. Apart from stating the obvious – that the Sales Comparisons Approach looks "to other sales" of property – Gulf Power utterly refuses to answer this interrogatory at this time. Apparently, once again, Gulf Power is attempting to avoid answering an important question until a time at or near the close of discovery. *See* March

30, 2005 Order (re-setting the date for disclosure of expert summaries as November 18, 2005).

In its December 3, 2004 “Preliminary Statement on Alternative Cost Methodology,” Gulf Power mentioned that it was considering basing its demand for a higher pole attachment on what it called the “Sales Comparison Approach.” Complainants are entitled to have this interrogatory, which asks for Gulf Power’s explanation and application of this valuation method to pole attachment rates, answered now – not at or near the end of discovery.

Interrogatory No. 45:

Identify the pole attachment rental rates paid to Gulf Power by joint users, the specific amount of pole space leased by such joint users, and explain the methodologies, if any, used to calculate these rates.

Gulf Power’s Response:

Gulf Power’s Response consists of two charts, listing pole attachment rental rates paid to Gulf Power by joint pole users and the amount of pole space used by such joint users.

Complainants’ Argument:

Gulf Power’s response is incomplete. Although Gulf Power provided data about pole rates and pole space, it provided no response at all to Complainants’ request that Gulf Power explain the methodologies used to calculate the rates it receives from joint pole users.

Accordingly, Gulf Power has a duty to answer the question as it pertains to the methodologies used to calculate the rates it receives from joint pole users. Particularly in this proceeding, where Gulf Power is claiming that it has a constitutional right to charge more for pole space, Complainants are reasonably entitled to discover all bases upon which Gulf Power calculates rates for the use of any portion of its poles.